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Supreme Court of the United States

OCTOBER TERM, 1940

No. 180

SUPERIOR BATH HOUSE COMPANY,.....*Appellant*,

v.

Z. M. MCCARROLL, COMMISSIONER OF REVENUES FOR THE STATE OF ARKANSAS,.....*Appellee*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR APPELLANT

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OPINION OF THE SUPREME COURT OF ARKANSAS

The opinion of the Supreme Court of Arkansas has not appeared in the bound volumes of the reports of that Court. It will be found in Arkansas Law Reporter, Vol. 72, No. 12, page 795, delivered April 1, 1940, and 139 South Western 2d 378.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The grounds on which the jurisdiction of this Court is invoked have been set out in the statement as to jurisdiction heretofore filed by appellant in compliance with

section 1 of Rule 12, namely, that the Supreme Court of Arkansas erred in holding that Act No. 118 of the General Assembly of Arkansas for the year 1929, as amended by Act No. 220 for the year 1931, which are the Arkansas Income Tax Acts, applied to the operation and business of appellant, which was confined solely to the Hot Springs National Park Reservation, where it maintained its one and only office and one and only place of business, in that jurisdiction over the area had been ceded to the United States by the State of Arkansas under Act No. 30 of the General Assembly of 1903 and accepted by the Act of Congress of April 20, 1904. It was claimed that the opinion was in error in holding that the State of Arkansas reserved the right to tax the income of appellant corporation on its business conducted within the Reservation, under the taxing power extended the State of Arkansas by Acts of Congress of March 3, 1891, and April 20, 1904; that the Arkansas Income Tax Act, as defined by the Legislature of the State of Arkansas and construed by the Supreme Court of Arkansas, was a property tax within the meaning of the Acts of Congress of March 3, 1891, and April 20, 1904; that the exemption extended corporations from the payment of tax on income derived extra-territorially, and denial to appellant of a like exemption did not offend the equal protection accorded it under Amendment XIV to the Constitution of the United States; that the threatened levy on and sale of its property located on the United States Government Reservation for its income so derived, did not constitute the taking of its property without due process of law, in violation of Amendment V to the Constitution of the United States; and that the opinion construing said acts was repugnant to the laws of the United States applicable to the Hot Springs National Park Reservation, limiting the

State of Arkansas to taxation of personal property under the compact entered into between the United States of America and the State of Arkansas respecting jurisdiction, as reflected by said Acts (R. 26-27-28).

STATEMENT OF THE CASE

Act No. 118 of the General Assembly of Arkansas for 1929, imposed an annual tax on corporations organized under the laws of the State of Arkansas equivalent to 2% of the entire net income of such corporation, "with respect to carrying on or doing business by the corporation", for and subsequent to the year 1928. Within the time prescribed by said Act, and during the year 1929, the appellant prepared and submitted an income tax return for the year 1928, and filed the same with the Commissioner of Revenues of the State of Arkansas (R. 4), under which it made the claim that it was exempt from taxation of its income derived from its operations confined solely to the Hot Springs National Park. The return was accepted by the Commissioner of Revenues, whose rule departmentally affirmed appellant's claim of exemption from the imposition of the said tax. No subsequent return was tendered by appellant, and no demand was made on it for the payment of the tax by any succeeding Commissioner of Revenues until on or about the 18th day of January, 1939, when the defendant, Z. M. McCarroll, as Commissioner, being charged with the administration and enforcement of said Act, assessed and attempted to collect the same on appellant's income for the years 1928 to 1938, inclusive.

Appellant applied to the Pulaski Chancery Court on petition to restrain its collection, alleging, among other things, that its only office and business was located in the Hot Springs National Park (R. 2); that exclusive jurisdic-

tion over the area of appellant's operations had been ceded to the United States, reserving only the right to tax structures and property in private ownership thereon, under the laws of the State of Arkansas applicable to the equal taxation of personal property (R. 3); that the United States had accepted the cession of the area and exercised sovereignty over the lands at all times since the grant by the State of Arkansas, with the exception of the right to tax as extended by the Act of Congress of March 3, 1891 (R. 3); that Act No. 220 of the Acts of Arkansas for 1931 exempted Arkansas corporations from the payment of tax on income derived from business outside the State, and it, taken in consideration with Act No. 118 of Arkansas for 1929, rendered the act of the Commissioner in attempting to levy and collect the tax, an unconstitutional discrimination and classification, by reason of which appellant was denied the equal protection accorded it under Amendment XIV to the Constitution of the United States, and that the threatened sale would constitute the taking of its property without due process of law, in violation of Amendment V to the Constitution of the United States (R. 4); that the act of the Commissioner in his construction, and the application of said Act No. 118 of Arkansas for 1929, to plaintiff's operations, was repugnant to the Acts of Congress and the construction placed on said acts by the courts of the United States (R. 4). To said petition a special demurrer was filed, and the Chancery Court dismissed the petition without opinion, for want of equity with respect to the taxes for the years 1936 to 1938, inclusive. With respect to prior years, the petition was granted by reason of the bar of the Arkansas statute of limitations (R. 14).

Appellant and appellee appealed to the Supreme Court of Arkansas, which is the highest State Court, and there on

the 1st day of April, 1940, the order of the Pulaski Chancery Court was affirmed as to the liability for income tax for the years 1936 to 1938, inclusive. It was reversed with respect to the tax for the years 1929 to 1935, inclusive, holding that this period was not barred by the Arkansas statute of limitations, but that on the basis of the return for the year 1928, which was made in 1929, a bar existed as to that year (R. 15). Within the time allowed by law, a petition for rehearing was filed, and by order of the Court denied on the 13th day of May, 1940 (R. 20-22), the judgment at that time becoming final. Application was made to the Honorable Griffin Smith, Chief Justice of the Supreme Court of Arkansas, for an appeal to this Court, which was granted, and on which, on the 14th day of October, 1940, this Court noted probable jurisdiction (R. 25).

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

Appellant's assignment of errors was incorporated with its petition for appeal to this Court and prayer for reversal. The errors assigned appear on pages 27 and 28 of the Record. The five assignments are interrelated and bear directly upon the question as to whether or not appellant's income, derived solely from the maintenance of its only office and the conduct of its sole business on the Hot Springs Reservation, could be taxed under Act No. 118 of the Acts of Arkansas for 1929, as amended by Act No. 220 of 1931. This in view of the fact that jurisdiction of that area had been ceded to the United States by Act No. 30 of Arkansas for 1903, reserving only the right to tax all structures and other property in private ownership on the Hot Springs Reservation accorded the State by Act of Congress of March 3, 1891 (26 Stat. 844), which Act of March 3,

1891, extended to the State the right to tax "under the authority of the laws of the State of Arkansas applicable to equal taxation of personal property in that State, as personal property, of all structures and other property in private ownership on the Hot Springs Reservation", which cession was accepted by Act of Congress of April 20, 1904 (c. 14, par. 1, 33 Stat. 187), embracing by reference the provisions of the Act of March 3, 1891, *supra,* relative to taxation. Further, that since Act No. 220 of Arkansas for 1931 exempts from taxation corporate income which is derived from operations conducted beyond the sovereignty of the State, the failure to extend a like immunity to appellant's operations constitutes a denial to it of the equal protection accorded under Amendment XIV to the Constitution of the United States, and the levy on its property for such income constitutes the taking of its property without due process, in violation of Amendment V to the Constitution of the United States.

Our argument will be based on all of the assignments of errors, and they are as follows:

The Supreme Court of Arkansas erred in holding and deciding:

I.

That Act No. 118 of the Acts of Arkansas for 1929, as amended by Act No. 220 of the Acts of Arkansas for 1931, in taxing appellant's income, did not constitute an unconstitutional discrimination and classification, denying to appellant the equal protection accorded it under Amendment XIV to the Constitution of the United States and that the tax so levied was not in violation of the prohibition contained in said Amendment.

II.

In failing to hold and decide that the levy and sale of its property located on said United States Government Reservation for income tax under the provisions of Act No. 118 of Arkansas for 1929, as amended by Act No. 220 of Arkansas for 1931, resulting from business conducted solely thereon, constituted the taking of its property without due process of law, in violation of Amendment V to the Constitution of the United States.

III.

That Act No. 30 of the General Assembly of Arkansas for the year 1903 reserved to the State of Arkansas the right to tax appellant's income arising from operations conducted solely on the Hot Springs National Park Reservation.

IV.

That the Act of Congress of March 3, 1891 (c. 533, par. 5, 26 Stat. 844), and the Act of Congress of April 20, 1904 (33 Stat. 187, 16 USCA, paragraphs 372-383) by extending to the State of Arkansas the right to tax as personal property all structures and other property in private ownership on the Hot Springs National Park Reservation, authorized the taxation of appellant's income under the provisions of Act No. 118 of Arkansas for 1929, as amended by Act No. 220 of Arkansas for 1931.

V.

That by the compact entered into between the United States of America and the State of Arkansas respecting sovereignty and jurisdiction of the area embraced in the Hot Springs National Park, as reflected by Acts of Congress of April 20, 1832, 4 Stat. at L. 505, par. 3; December 16,

1878, c. 5, 20 Stat. 258; March 3, 1891, c. 533, par. 5, 26 Stat. 844; and April 20, 1904, c. 1400, par. 1, 33 Stat. 187; and Act No. 30 of the General Assembly of the State of Arkansas for 1903, the State of Arkansas was not limited to taxation, as personal property, of structures and personal property in said area.

SUMMARY OF POINTS AND AUTHORITIES

I.

The area embraced in the Hot Springs National Park Reservation is not a part of the State of Arkansas and is completely beyond its jurisdiction, with the sole exception of the right to tax as personal property the buildings and structures thereon and the personal property of individuals situated in the area.

Arlington Hotel Co. v. *Fant*, 278 U. S. 439.

Collins v. *Yosemite Park & Currie Co.*, 304 U. S. 517.

Ft. Leavenworth Ry. Co. v. *Lowe*, 114 U. S. 525.

Hot Springs Cases—Rector v. *U. S.*, 92 U. S. 698.

James v. *Dravo Contracting Co.*, 302 U. S. 134.

Williams v. *Arlington Hotel Co.*, 22 F. (2d) 669.

Yellowstone National Park Transportation Co. v. *Gallatin County*, 31 F. (2d) 644.

Ex Parte Gaines, 56 Ark. 227.

Surplus Trading Co. v. *Cook*, 281 U. S. 647.

Buckstaff Bath House Co. v. *McKinley, Commissioner*, No. 201 Oct. Term 1939; U. S. Supreme Court Advance Opinions (Law Ed.) Vol. 84 No. 4, page 242.

Fant v. *Arlington Hotel Co.*, 170 Ark. 440.

Arlington Hotel Co. v. *Fant*, 176 Ark. 613.

Buckstaff Bath House Co. v. *McKinley, Commissioner,* 198 Ark. 91.

II.

The Income Tax Act of Arkansas (Act No. 118 of 1929) is not a property tax within the meaning of the reservation of taxing authority by the State in its cession of exclusive jurisdiction of the Hot Springs Reservation.

Stanley v. *Gates,* 179 Ark. 886.

Baker v. *Hill,* 180 Ark. 387.

Davies v. *Hot Springs,* 141 Ark. 521.

Henneford v. *Silas Mason Co.,* 300 U. S. 577.

Chattanooga & St. L. Ry. v. *Wallace,* 288 U. S. 249.

III.

The State is precluded from collecting an income tax on the privilege of conducting business in a place beyond its sovereignty.

James v. *Dravo Contracting Co.,* 302 U. S. 134.

IV.

Compacts entered into between States and the United States on the surrender of sovereignty over lands lying within the boundaries of the State are to be construed in the same manner as ordinary contracts between individuals, with a strict construction against neither.

Collins v. *Yosemite Park & Currie Co.,* 304 U. S. 517.

James v. *Dravo Contracting Co.,* 302 U. S. 134.

Merchants Transfer & Whse. Co., v. *Gates,* 180 Ark. 97.

V.

The exemption extended corporations from the payment of income tax on operations conducted beyond the sovereignty of

Arkansas and the imposition of a tax under a like situation on appellant's income constitutes a denial to it of the equal protection afforded it under Amendment XIV to the Constitution of the United States, and the sale of its property for such tax would constitute the taking of its property without due process of law, in violation of Amendment V to the Constitution of the United States.

McCarroll, Commr., v. *Gregory-Robinson-Speas, Inc.*, 198 Ark. 235.

Royster-Guano Co. v. *Virginia*, 253 U. S. 412.

ARGUMENT

The undisputed facts are that appellant's sole business is the operation of a bath house located on the Hot Springs National Park Reservation, and that it maintains no office except on the Reservation, from which operation it derives all of its income. The primary question, therefore, to be determined is whether or not the State of Arkansas, having ceded exclusive jurisdiction over the Hot Springs National Park Reservation, retained the right to levy income tax under taxing powers reserved in the grant for "taxation under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property * * * as personal property, of all structures and other property in private ownership on the Hot Springs Reservation"; is the Arkansas income tax as enacted by the Legislature and as defined by the Supreme Court of Arkansas, such a tax as comes within this definition or description.

It cannot reasonably be contended that sovereignty over this area has not been surrendered by the State, with the exception of this taxing reservation, and undoubtedly the United States can accept such sovereignty over lands within the borders of a State for public purposes. Secondly, if the Arkansas income tax is not such a tax as is embraced

in the wording of the clause reserving taxing power in the State of Arkansas, does the fact that the State exempts other corporations organized under its laws from the payment of income tax on earnings beyond its sovereignty, and the imposition of the tax on appellant constitute the denial to it of the equal protection afforded it under Amendment XIV to the Constitution of the United States, and does the sale of its property for the tax constitute the taking of its property without due process of law, in violation of Amendment V to the Constitution of the United States?

I.

The area embraced in the Hot Springs National Park Reservation is not a part of the State of Arkansas, and is completely beyond its jurisdiction, with the sole exception of the right to tax, as personal property, the buildings and structures thereon and the personal property of individuals situated within the area.

In support of this proposition, we wish to briefly discuss the status of lands held within the physical boundaries of the States by the United States and particularly the history of the Hot Springs National Park Reservation. Lands may be held within the physical boundaries of the States by the United States under three general classifications, the first being those lands which the United States owns, that is, which had not been conveyed by grant, patent, or otherwise, to individuals at the time of the admission of the State to the Union and which had not been dedicated or appropriated to public use; second, those lands acquired by purchase under authority of Article I, Section 8, of the Constitution of the United States, for the erection of forts, magazines, arsenals, dock yards and other needful buildings; and, third, those acquired by cession from the States for governmental purposes, projects and general public use.

The rights of the States in connection with these lands are determined by the particular classification. In the first instance, namely, those lands to which the United States had title at the time of the admission to the Union, the State has complete sovereignty, subject only to the proprietary interest of the United States. The only qualification of its sovereignty is that these lands cannot be taxed while in the ownership of the United States, but the laws of the State, civil or criminal, are applicable to individuals residing on these lands, their property located thereon, and acts there committed. Any interest in these lands which an individual might acquire by lease or otherwise is also subject to taxation by reason of the sovereignty of the State. The Constitution of the United States did not contemplate that the confederation formed under it would hold crown lands as a monarchy for the purpose of deriving revenue, but that all lands which it became the owner of, not put to public use under the two latter classifications, would find their way into private ownership.

Exclusive sovereignty is vested in the United States over lands acquired under the provisions of Article I, Section 8, of the Constitution of the United States, which extends to the area acquired by the United States, regardless of whether or not a portion of the area might be put to some use other than the public purpose. In other words, sovereignty, having passed to the United States, does not revert to the State on the conveyance of an interest in the land by the United States to an individual. A like situation, with regard to sovereignty, exists over lands acquired by the United States for public purposes by act of cession from the States, with the exception that the States may reserve rights not inconsistent with the governmental pur-

pose, but all rights and all sovereignty except that saved passes to the United States.

The area under consideration partakes of the character of governmental lands acquired under Article I, Section 8, of the Constitution of the United States, and those acquired by cession of the State. It so happens that the United States had the proprietary interest in the lands prior to their dedication to public use. It could have, lacking that proprietary interest, purchased the same, with the consent of the Legislature under the provisions of Article I, Section 8, of the Constitution, for there is no question of the authority of the United States to engage upon such a project.

All lands in Arkansas were acquired by the United States under the Louisiana Purchase from France in 1803, and from 1803 to 1836 it was sovereign and proprietor of the area. Of course, it recognized the rights of individuals acquired in the lands from former sovereigns prior to 1803 under the settled policy and law of the United States relating to lands obtained by cession, purchase or conquest, so long as the rights were not inconsistent with the laws of the United States. During territorial days the United States parted with its proprietary interest in much of the area. At the time of the Louisiana Purchase the Hot Springs area was claimed by the Quapaw Indians, with whom the United States made a treaty surrendering their claim in 1818. These springs were regarded from the earliest times as highly beneficial to health, and were mentioned as remarkable by President Jefferson in his message to Congress, and from the very beginning the United States intended to dedicate them and the area to the general public and to retain sovereignty and control over them for that purpose, after the expiration of the Quapaw treaty.

In accordance with this purpose, Congress, on April 20, 1832, passed an act as follows:

> "The hot springs in said territory, together with four sections of land including said springs, as near the center thereof as may be, shall be reserved to the future disposal of the United States, and shall not be entered, located or appropriated for any purpose whatever." 4 Stat. at L. 505, par. 3.

Arkansas was admitted to the Union in 1836, but the act of admission neglected to make reservation of the sovereignty of the United States to protect the dedication which it had made of these lands under the Act of Congress of April 20, 1832, which evidently was an oversight, because Congress continued to legislate with respect to the subject in a sovereign capacity, as distinguished from a proprietary interest, as late as March 3, 1891. This is clearly indicated by the fact that on December 16, 1878, Congress passed an act containing the following:

> "Provided, that all titles given or to be given by the United States shall explicitly exclude the right to the purchaser of the land, his heirs or assigns, from forever boring thereon for hot water, and the hot springs, with the reservation and mountain, are hereby dedicated to the United States and shall remain forever free from sale or alienation." 20 Stat. 258, c. 5.

On March 3, 1891, Congress passed the following act:

> "The consent of the United States is hereby given for the taxation under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State as personal property, of all structures and other property in private ownership on the Hot Springs Reservation." 26 Stat. 844, c. 533, par. 5.

It is apparent that Congress was under the impression that its Act of April 20, 1832, dedicating this area, became a part of the act of admission of Arkansas to statehood, and operated to reserve sovereignty over the area in the United States, just as effectively as it without doubt could have done if the reservation had been made in the act of admission, for any other conclusion would render the Act of March 3, 1891, a meaningless gesture.

If, therefore, the Act of Congress of April 20, 1832, did not become a part of the act of admission to statehood, which we will concede and which fact has since been judicially determined, then this situation follows: After the act of admission of Arkansas in 1836, the State became the sovereign, and the United States held only the proprietary interest in lands in the State which it had not disposed of in any of the various methods so well known to the Court. Of course, the State was prohibited from taxing this proprietary interest, but it thereafter had full authority to tax all property of individuals on the lands of the United States and to tax any interest acquired by lease or otherwise in these lands so long as the proprietary interest of the United States was not taxed. The State had the full and complete power and sovereignty to tax any enterprise, any activity, any business or any occupation engaged in on those lands of which the United States was only the proprietor. All laws of the State of Arkansas, both civil and criminal, applied to the acts of individuals done or committed on the lands.

It appears, therefore, that Congress, by its Act of March 3, 1891, purported to extend to the State of Arkansas certain well defined but limited rights of taxation, which the State of Arkansas already possessed. It is, however, an inescapable conclusion that Congress thought otherwise,

which is the sole reason for the passage of the acts of cession and acceptance to be hereafter discussed, and which were enacted for the purpose of adjusting this controversy by mutual compact, concerning which compacts this Court has held:

> "The states of the Union and the National Government may make mutually satisfactory arrangements as to jurisdiction of territory within their borders * * *. It is a matter of arrangement. These arrangements the courts will recognize and respect." *Collins v. Yosemite Park & Currie Co.*, 304 U. S. 517, 528.

The Supreme Court of Arkansas, on the 21st day of May, 1892, decided the case of *Ex Parte Gaines*, 56 Ark. 227, in which was involved the right of the State to tax the leasehold interest of an individual acquired in a portion of the land embraced in the Hot Springs National Park Reservation. This was more than one year after the passage of the Act of Congress of March 3, 1891. The Court held that the leasehold interest, being an interest with which the United States had parted, was taxable, since it constituted property in the hands of an individual.

The leasehold interest was taxable because sovereignty over the lands passed to the State of Arkansas by the act of admission to statehood, but not by virtue of any right of taxation acquired under Act of Congress of March 3, 1891. Congress had no right of taxation, so far as individuals were concerned, to extend. However, if it had had taxation privileges to extend, the wording of the act would not have embraced a leasehold interest, for it is apparent that an attempt was being made by that act to sever the building on the lease from the soil and to convert it to personal property for taxation as personal property, in opposition to any interest in land, and the Act of Congress was not

discussed by the Supreme Court of Arkansas in that relationship, but solely from the standpoint of the conflict which might arise between the purchaser at the tax sale and the Secretary of the Interior over the change in ownership brought about by the sale. The Court said in its opinion at page 231:

> "But the Act of Congress, which was passed since the assessment and levy of the taxes in dispute, assenting to taxation by the State of all structures and other property in private ownership on the reservation, relieves the State and the purchaser at the tax sale of any embarrassment that might arise on that score."

From the time of this decision until the 21st of February, 1903, operations were conducted in this area under taxation rights in accordance with the ruling in the Gaines case, which evidently were unsatisfactory to the Department of the Interior, since in that year the Legislature of the State of Arkansas passed Act No. 30, ceding exclusive jurisdiction over a part of the Hot Springs Reservation described by metes and bounds, on which the springs were located and on which appellant maintains its office and place of business, reserving the limited right of taxation heretofore quoted. We wish to call the Court's particular attention to the fact that originally the United States dedicated four sections of land, including the springs, to public purposes and that the compact between the United States and the State of Arkansas represented by the Act No. 30 of Arkansas of 1903 and the Act of Congress of April 20, 1904, respecting sovereignty, applied to a very small portion of the original tract of land, on which was located the Arlington Hotel, the bath houses, the hot springs themselves, and the Army & Navy Hospital.

Congress, in accepting cession of this limited area, set up a complete system for its administration, provided the laws that should be applicable to it, and established a judicial system for their enforcement, designating the United States District Court for the Eastern District of Arkansas. The limited area ceased to be a part of the State.

The effect of the acts of cession and acceptance was to change the rights of sovereignty of the parties that existed at the time of the decision in the case of *Ex Parte Gaines,* which status was measured from the time of admission of the State of Arkansas in 1936, and to make the United States again the sovereign and the proprietor over the lands in question, as it was from 1803 to 1836, with the exception of the limited right of taxation which the State acquired under the compact. Certainly on the part of the State of Arkansas a change in sovereignty was contemplated, together with a restriction of its taxing rights with reference to property of individuals on the reservation or any interest in the lands with which the United States had parted. The interest of the United States could not have been taxed in any manner, and the subject of taxation could not have been addressed to any but individuals. The Gaines case had held that all property rights of every nature of these individuals on the Reservation could be taxed. It naturally follows that a restriction of taxing right on the part of the State was contemplated, and thereafter taxation could be exercised by the State, so far as individuals were concerned, only to a limited degree and not generally. On this subject the Supreme Court of Arkansas held in the case of *Merchants Transfer & Whse. Co.* v. *Gates,* 180 Ark. 96, at page 102:

> "It is a fundamental rule of construction that the Legislature is presumed to have enacted a statute in

the light of all judicial decisions relating to the same subject."

The decisions of this Court from *Ft. Leavenworth Ry. Co.* v. Lowe, 113 U. S. 525, to *Collins* v. *Yosemite Park & Currie Co.*, 304 U. S. 517, uniformly hold that sovereignty vests in the United States over lands acquired within the boundaries of the States, whether by cession or by purchase under Article I, Section 8, of the Constitution subject only to the particular rights reserved by the State in the act of cession or general enabling act; that the reservation so made would be invalid if it interfered with the use of the United States in the case of lands acquired by purchase under the constitutional provision. The only doubt which the Court has ever expressed is not on the question of the right to acquire sovereignty on the part of the United States, but on the question of the invalidity of any reservation by the State in either instance.

Since the decisions of this Court in the cases of *James* v. *Dravo Contracting Co.*, 302 U. S. 134, and *Collins* v. *Yosemite Park & Currie Co.*, 304 U. S. 517, apparently lands purchased under Article I, Section 8, and lands acquired by cession, as relating to sovereignty, are on the same basis, that is, all sovereignty passes to the United States in the absence of a reservation and the State retains only the specific rights named in the grant or enabling act in either classification.

The case of *Ft. Leavenworth Ry. Co.* v. *Lowe, supra,* recognizes the principle that the United States can acquire exclusive sovereignty over lands within the physical boundaries of a State, that is, the lands on cession cease to be a part of that State and remain so even though a part is later put to private use by the United States. At page 541 of that opinion the Court said:

> "As instrumentalities for the execution of the powers of the general government, they are, as already said, exempt from such control of the States as would defeat or impair their uses for these purposes; and if to their more effective use a cession of legislative authority and political jurisdiction by the State would be desirable, we do not perceive any objection to its grant by the legislature of the State."

That very grant was later made by the Legislature of the State of Kansas over the lands which had the identical status of those involved in this case.

This Court held in the case of *Arlington Hotel Co.* v. *Fant,* 278 U. S. 439, that acts of the Legislature of the State of Arkansas passed subsequently to the cession in 1903, had no effect and were inoperative on the Reservation, which plainly demonstrates that the Reservation ceased to be a part of the State—it became extra-territorial. At the most, Arkansas had reserved a taxing easement which could not be enlarged upon by subsequent act of the State Legislature. It was fixed by the terms and as of the date of the compact. The Arkansas Income Tax Act was passed many years after the area had ceased to be a part of Arkansas. We will enlarge upon this statement in subsequent portions of this argument dealing with the nature and validity of the taxing easement which the State in fact reserved, since we are endeavoring to confine this portion solely to sovereignty.

In *Williams* v. *Arlington Hotel Co.,* 22 F. (2d) 669, the same question was involved as in *Arlington Hotel Co.* v. *Fant,* with the exception that in the lower court the contention was made that the portion of the ceded area occupied by the Arlington Hotel was not in Government use, and therefore subject to the laws of Arkansas enacted sub-

sequent to the cession in 1903. The Circuit Court of Appeals rejected this contention, holding that complete sovereignty of the area had been surrendered and that the laws of Arkansas had no application thereon after cession, regardless of the use to which the lands had been put.

In the case of *Yellowstone Park Transportation Co.* v. *Gallatin County,* 31 F. (2d) 644, citing *Ft. Leavenworth Ry. Co.* v. *Lowe,* and *Arlington Hotel Co.* v. *Fant,* the Court said, at page 645:

> "In other words, after the date of cession the ceded territory was as much without the jurisdiction of the State making the cession as was any other foreign territory except insofar as jurisdiction was *expressly reserved.*" (Italics ours.)

The Supreme Court of Arkansas, in the interrelated opinions of *Fant* v *Arlington Hotel Co.,* 170 Ark. 440, and *Arlington Hotel Co.* v. *Fant,* 176 Ark. 613, also determined that the area embraced in the Hot Springs National Park Reservation was beyond the sovereignty of Arkansas; that the only reason the courts of this State could take jurisdiction of a cause of action arising on the Reservation was on account of its transitory nature, but which cause of necessity had to be determined by the laws of the Reservation and not the laws of Arkansas, and while the laws of Arkansas existing prior to cession remained in effect in that area, nevertheless it was because of the policy of the United States to retain laws in ceded areas so long as the same were not inconsistent with its own, but these laws of Arkansas prior to cession became United States laws and not State acts; in short, that this was a foreign area just like any other State or territory.

In the case of *Surplus Trading Co.* v. *Cook,* 281 U. S. 647, this Court denied Pulaski County, in which the Camp

Pike area was located, the right to tax property of individuals located on the Reservation, and while it is true that this area was purchased under Article I, Section 8, of the Constitution, nevertheless the same character of sovereignty is obtained as in the case of cession. The only difference between the Arkansas act extending permission to purchase for public purposes and the act of cession of the Hot Springs Reservation, is that one reserved certain rights of taxation and the other was free of restrictions. The acts were passed at the same session of the Legislature and were a part of the general plan of the United States throughout the Nation to secure more definite agreements from the States relating to the lands in their physical boundaries which were devoted to public purposes.

The Court went into the question of sovereignty at length in that case and quoted with approval prior decisions holding that residents of these areas did not have political privileges in the States in which they were located; they were not citizens of those States; they were not bound by any of its laws, civil or criminal, and consequently did not have the benefit of the protection of the laws of the State.

The last court expression that we have been able to find on this subject is that of this Court in the Collins case, 304 U. S., at page 533:

> "As the State of California has in the area of the Yosemite National Park only the jurisdiction saved under the cession and acceptance acts of 1919 and 1920, it does not have the power to regulate the liquor traffic in the Park. Except as to this reserved jurisdiction, California 'put that area beyond the field of operation of her laws'."

There is not one single decision to the contrary, and if income tax is not included within the plain wording of

the reservation of the right to tax retained in the act of cession of 1903, which embraced and incorporated the wording of Act of Congress of March 3, 1891, we maintain it cannot be levied under the authority of that Act on income derived from business conducted on the Hot Springs Reservation. The Act itself says *"exclusive jurisdiction"* is ceded. The act of acceptance by Congress says *"sole and exclusive jurisdiction"* is accepted; and we therefore believe that we have sustained our contention that this area is, as stated by the Court in the case of *Yellowstone Park Transportation Co.* v. *Gallatin County, supra,* "as much without the jurisdiction of the State * * * as any other foreign territory."

The State of Arkansas reserved the right to tax the buildings and structures on the leasehold estates as personal property, and tangible personal property of individuals on the Reservation, and nothing else.

All of the opinions of the Court have been to the effect that these compacts and agreements are to be construed according to the ordinary meaning of their terms in the light of attendant circumstances, and under that rule we shall attempt to analyze the provisions of the particular taxing reservation in this case.

If the State of Arkansas had sovereign and general taxing power over this area from the date of its admission to the Union in 1836, so far as property, franchises or rights of individuals within the area were concerned, and the Supreme Court of Arkansas had so held, even to the extent of the leasehold interest, with which the United States had parted, it necessarily follows that it intended to surrender some part of that taxing power along with its avowed intention to cede exclusive jurisdiction. The nature of the taxing right surrendered therefore can be found by

construction of the provisions of the various acts on the subject in accordance with existing law and prior court decisions bearing on that question. This is a fundamental rule of statutory construction.

Act No. 30 of Arkansas of 1903 adopted the specific wording of the Act of Congress of March 3, 1891, and reserved the right to tax "all structures and other property in private ownership" * * * "accorded the State by the Act of Congress March 3, 1901" (1891). The word "structures" needs no interpretation. The word "property" may need construction, but the very act itself attempted to supply that construction, for just preceding its use the specific reference is made to taxation under the laws "applicable to equal taxation of personal property" in the Act of Congress March 3, 1891 which phrase, by adoption is a part of Act 30 of Arkansas for 1903. This characterization of property eliminates all franchise tax, income tax, use tax and excise tax of any nature, and that is exactly what the contracting parties were attempting to do, for the uniform personal property tax was well known to the parties and did not constitute any interference with the promotion by the Department of the Interior of the hot springs for public use. Any other tax might or might not have interfered with that promotion, and in order to avoid the possibility of interference the reservation was limited to this distinct and well defined species of tax. It is absolutely certain that the grant precluded the taxation of the leasehold interest which the State had the right to tax at the time of the decision in the Gaines case, *supra,* and substituted the structure separated from the freehold in its place, which structure ceased to be carried on the real estate assessment books and was carried over to the personal property books of the County Collector, so that if a

different rate of taxation should be adopted for real estate and personal property, the latter would fix its rate of taxation.

If the Act itself were not plain enough, there is still another absolute guide to an interpretation showing that only the right to tax tangible personal property was reserved, for at this time Article XVI, paragraph 5, of the Constitution of Arkansas of 1874 specifically defined the subjects of taxation. That section provided for *equal* and *uniform* taxation of real and personal property, that is, tangible personal property; and in addition the Legislature was permitted to tax in such manner as it deemed proper hawkers, peddlers, ferries, exhibitions and privileges. There is no provision for uniformity of taxation according to value of this latter class of taxation, and of course it was not intended to be reserved to the State for taxation in the Act of cession of 1903.

The Congress and the Legislature had in mind the taxing power which the Constitution of Arkansas gave to its Legislature, and these acts were drafted with reference to it. But if the parties to the contract did not in fact have in mind this provision of the Arkansas Constitution in framing these reciprocal acts, still the courts would have attributed this knowledge to them, because it is a fundamental rule of construction that the act of the Legislature is to be construed in ascertaining its meaning with reference to, first, all prior acts on the same subject, and this would include Acts of Congress as well as the Legislature, and, second, all judicial decisions on the subject, certainly the provisions of the Arkansas Constitution relative to taxation are imputed to the legislative mind; especially is this so when words are used that have a well defined legal meaning.

Any other construction of the wording of this taxing reservation would place the situation right back as it was at the time of the decision in the Gaines case and before the passage of Act No. 30 of Arkansas of 1903, and would nullify the effect of that Act and the Act of Congress of April 20, 1904.

We contend that the foregoing propositions of legal construction which we have advanced have not been changed in any wise by the Court's decision in the cases of *James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Collins* v. *Yosemite Park & Currie Co.*, 304 U. S. 517; and *Buckstaff Bath House Co.* v. *McKinley, Commissioner,* Advance Opinions (Law Ed.) Vol. 84, No. 4, page 242, for in the first the reservation was "concurrent jurisdiction retained for taxation not in conflict with or a burden on the federal purposes." In the Collins case the right to tax which was reserved was that of every tax known to the law applicable to persons and corporations, their franchises and property, unqualified by any provision for relieving a burden on the federal purposes. Apparently, therefore, this Court's construction of those two taxing reservations sheds little or no light on the meaning of the particular reservation in question. The gist of the decision in the Collins case, it appears to us, is that a license is not a tax, and consequently that provision of the California Alcoholic Beverage Control Act had no effect within the Reservation, because although all taxing right had been reserved, sovereignty over the area had been surrendered.

The basis of the decision of the Supreme Court of Arkansas in the case of *Buckstaff Bath House Co.* v. *McKinley, Commissioner,* 198 Ark. 91, was that the State, having the right to tax personal property under the taxing power in question, resultantly had the right to tax the use of that

property. However, we do not believe this Court, in passing on the appeal in that case, adopted a like construction or decided that the right of taxation for social security contributions inured to the State by reason of the reservation in Act No. 30 of Arkansas for 1903. We take it that the decision, in short, held that the United States under a general law taxed for a similar purpose persons occupying the status of the Bath House Company and that the taxing act of the United States impliedly intended that the States would tax the same classes, since all was a part of a coordinated plan under which the State acts were to be reciprocal to and integrated with the national Social Security Act. The Court said, in the last paragraph of the opinion:

> "The implied authority which we here find to exist" (given under the national Social Security Act) "is therefore used not to override an earlier express authority but merely to extend it to a degree."

If the State had the right to tax under the construction of the provision of Act No. 30 of Arkansas for 1903, then it needed no implied extension of authority by the national Social Security Act, and conversely the only logical conclusion which follows is that the right to tax the use of property was not included in the original reservation, or there would have been no necessity for extension. But for the implied extension of authority to tax in a subsequent Act of Congress, it did not exist, because without this implied authority—this implied invitation to tax—the laws of Arkansas could have no force and effect on the Hot Springs Reservation.

The Income Tax Act of Arkansas bears no relationship to any federal act on the subject, and consequently we believe that we have shown by the foregoing that it is not that character of a tangible personal property tax

within the meaning of the reserved power to the State of Arkansas.

Equal taxation of personal property is a simple statement; it in fact ought not to require the aid of anything else for its construction. It is the class of property in private ownership over which the State reserved taxing power.

II.

The income tax of Arkansas is not a property tax within the meaning of the reservation of a taxing authority by the State in its cession of exclusive jurisdiction of the Hot Springs Reservation.

The Supreme Court of Arkansas has based its decision in the present case squarely on the proposition that the State's authority for levying the income tax is embraced in the provisions of the Act of Congress of March 3, 1891, consenting to "taxation under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State as personal property of all structures and other property in private ownership on the Hot Springs National Park Reservation", with the additional statement that the area is not extra-territorial; and cites the case of *Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S. 601, for its authority in holding that the Arkansas income tax is a property tax within the meaning of the right extended aforesaid. We wish, therefore, to discuss the nature of the Arkansas income tax as it has been defined by the courts of this State, and as taxation is limited in Arkansas by the provisions of the Arkansas Constitution.

The Pollock case was decided by this Court on May 20, 1895, thirty-four years prior to the passage of the Arkansas Income Tax Act, and twenty-one years after the

adoption of the present Constitution of Arkansas in 1874, and this decision was a familiar signpost to every student of income tax and was uppermost in the minds of all Legislatures thereafter contemplating the passage of an income tax act, with respect to what extent they might be limited by their own particular State constitutions.

At the time of the adoption of the Arkansas Constitution, the field of taxation was limited to only a few subjects, and the bulk of the income of the State was derived from taxes on real and personal property. We think that it is fair to state that income tax in that day did not exist in the minds of most advanced students of taxation, and for a number of years serious doubt existed in the minds of the lawyers and of the courts of the authority of the State to levy an income tax of any character under the taxing powers defined in the Constitution of Arkansas of 1874, which statement is substantiated by the reasoning of the Court in the cases which we shall discuss in this connection.

Article XVI, paragraph 5, of the Constitution of Arkansas of 1874 deals with the subjects of taxation existing in this State, and it was not amended prior to the passage of the Arkansas Income Tax Act nor subsequent to that time. It provides as follows:

> "All property subject to taxation shall be taxed according to its value (a), that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State (b). No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value (c), provided the General Assembly shall have power from time to time to tax hawkers, peddlers (d), ferries, exhibitions and privileges (e), in such manner as may be deemed proper."

The courts of this State have uniformly held that the provisions of equality and uniformity apply only to real and personal property on an ad valorem assessment.

The Supreme Court of Arkansas, in the case of *Davies* v. *Hot Springs,* 141 Ark. 521, in which case it was claimed that a privilege tax which had been assessed discriminatorily and without equal application to all occupations was void, said (page 526):

> "It is claimed, however, that the statute provides an unjust and discriminatory method of classification which renders it void. In consideration of that question it must be remembered that the provision of the Constitution *with respect to uniformity in taxation"* (italics ours) "applies only to a property tax and has no reference to the taxation of privileges."

With this constitutional restriction in view, and realizing that an income tax was not equal and uniform on all property regardless of value, and, further, intending that it should operate on a graduated scale, the General Assembly of Arkansas for 1929 passed the Arkansas Income Tax Act. In order to safeguard the Act so that it would not be invalid by reason of constitutional prohibition, and so that it would not fall within the classification of the prohibition contained in the case of *Pollock* v. *Farmers Loan & Trust Company, supra,* the Legislature in the preamble to and the body of the Act went to great length to classify it as at least something separate and apart from a tax on property or a tax in any manner determined by the use of property, unaffected by either Sections (a) or (b), Article XVI, paragraph 5, of the Constitution of Arkansas. The preamble, Section 3, recites:

> "Whereas, agricultural and industrial development is now being retarded because of a policy to

secure practically all of the revenue from an ad valorem tax, thus penalizing and discouraging ownership of property, while many who enjoy the benefits of government and have large incomes, pay almost nothing to support the Government;

"ARTICLE II—*Imposition of Tax.*

"Section (3) (a)—On Individuals.—A tax is hereby imposed upon and with respect to the entire income of every resident, individual, trust, or estate, which tax shall be levied, collected and paid annually upon such entire net income as herein computed, at the following rates, after deducting the exemptions provided in this Act; * * *

"(b) On Corporations.—Every corporation organized under the laws of this State shall pay annually an income tax *with respect to carrying on or doing business"* (italics ours) "equivalent to two (2%) per cent of the entire net income of such corporations as defined herein, received by such corporation during the income year; * * *

"(c) On Income of Arkansas property of non-residents.—A like tax is hereby imposed * * * with respect to the entire net income * * * *from all property owned"* (italics ours) "and from every business, trade or occupation carried on in this State by individuals, corporations, partnership, trusts, or estates, not residents of the State of Arkansas."

At least, so far as the tax on corporations was concerned, the Act itself tried to limit and confine it to that of use or privilege, so that it could not by any possibility offend the provisions of equality and uniformity required by the first two sections of Article XVI, paragraph 5, of the Constitution of Arkansas, and this in addition to generally limiting the classification of income tax to something

separate and apart from property tax, whether equal and uniform or not, as reflected by the preamble.

The general Act was attacked in the courts of the State of Arkansas on many grounds, of which the two most prominent were, first, that Arkansas was precluded by the Constitution from enacting an income tax of any character, and, second, that if a property tax, it was invalid on account of the provisions of the Constitution which we have quoted above. The Supreme Court sustained the right of the State to levy an income tax, but on the question of whether or not it constituted a property tax in any sense of the word, held, in the case of *Stanley* v. *Gates,* 179 Ark. 886, that the income tax imposed by the Act of 1929 was not a property tax and that it did not fall within the classification of the first two provisions of Article XVI, paragraph 5, of the Constitution of Arkansas; that these two provisions related to the property itself, as distinguished from the annual gain or revenue from it, and that it was not such a tax as was subject to the uniformity provision of the first two sections of this article of the Constitution. The Court said that it deliberately adopted the view that it was not a property tax and that if not a property tax it made no difference by what name it was called, whether excise, in the nature of an excise, personal, or otherwise.

We therefore feel that in the face of this decision it would be impossible to so construe Act No. 30 of Arkansas of 1903 as having any reference to income tax, particularly since the State of Arkansas had no form of income tax at the time this compact was entered into between the State of Arkansas and the United States. How, therefore, could the contracting parties have had in mind such a species of taxation, for until this decision it was, as stated, extremely

doubtful that the Legislature had the constitutional power to levy any income tax.

In the Stanley case the Court said, at page 891:

"Reference to the various opinions in that case will show that the court recognized that there was a division in the authorities upon the subject, whether an income tax was a property tax or not, and we deliberately adopted the view that it was not a property tax. If it is not a property tax, it does not make any difference what name it is called, whether it is called an excise tax, or a tax in the nature of an excise tax, or a personal tax, is a matter of definition, and does not in any wise change its character."

And at page 893:

"There is no good reason for holding that inheritance tax laws and severance tax laws are not property taxes within the meaning of Article XVI, paragraph 5, of our constitution, and that income taxes are property taxes and fall within the ban of its provisions. A majority of the court has yet to see the distinction * * * It has been well said that 'a tax on incomes is not a tax on property, and a tax on property does not embrace incomes.' Hence a majority of the court holds that 'property' as the term is used in Article XVI, paragraph 5 of the Constitution means the property itself as distinguished from the annual gain or revenue from it."

And at page 900:

"Having held that an income tax is not a property tax, it follows that the equality and uniformity clause of the Constitution applicable to taxes on property has no reference to income taxes, and income taxation of a progressive character does not offend paragraph 18 of our bill of rights nor the Fourteenth Amendment to the Constitution of the United States guaranteeing equal protection of the laws."

Again the Supreme Court of Arkansas, in the case of *Baker* v. *Hill,* 180 Ark. 387, in which the Income Tax Act of Arkansas was under consideration, with respect to whether or not the rate imposed, in addition to other taxes levied on property for State purposes, exceeded the constitutional limitation of 1%, said, at page 391:

> "* * * If the Legislature has power to raise revenue for State purposes by a property tax, it may also levy a tax for that purpose upon any other legitimate subject of taxation. There is a marked distinction in our Constitution as recognized in our adjudicated cases, between property and other subjects of taxation. The phrase, 'subjects of taxation', embraces all property as such, and all other items on which a tax rate may be laid as a source of revenue for the support of the State Government. Since the Constitution contains no restriction on the power of the Legislature to levy taxes except as to property as such, the Legislature has full and complete power in the levy of taxes for State purposes as to other recognized subjects of taxation. The section under consideration is a part of article 16 of the Constitution on the subject of "Finance and Taxation.' Section 5 of the same article is commonly called the equality and uniformity clause of the Constitution, and has been uniformly construed by this court as relating to property only."

And at page 392:

> "In *Sims* v. *Ahrens,* 167 Ark. 557, 271 S. W. 720, it was held that, while the act under consideration subjecting all persons and corporations to a gross income tax was void because it necessarily operated in a discriminatory and arbitrary manner, still it was within the power of the Legislature to pass a properly classified net income tax law. This rule was reaffirmed in *Stanley* v. *Gates,* 179 Ark. 886, 19 (2d) S. W. 1000. In that case the court again held that an income tax was

not a property tax, and that the act therefore was not violative of the equality and uniformity clause of Section 5, art. 16, of the Constitution, which relates exclusively to property taxes."

"It necessarily results from these decisions that there are other sources of revenue for State purposes than that derived from the taxation of property. If the equality and uniformity clause of Sec. 5, art. 16, refers exclusively to property taxes and not to other subjects of taxation for State purposes, such as inheritance taxes, severance taxes, *income taxes* (italics ours) and privilege taxes, we can perceive no good reason why the limitation of the rate of taxation referred to in Sec. 8, art. 16, should not also be confined exclusively to property taxes. * * *"

And at page 394, where the Supreme Court of Arkansas declined to adopt the contrary holding of the Supreme Court of Alabama, the Court further said:

"* * * We have taken the contrary view, as will appear from our cases cited above, and have expressly held that an income tax and a property tax are not one and the same thing. * * *"

Regardless of the character of the tax involved in the case of *Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S. 601, the fact remains that the Arkansas Income Tax Act by its terms and by the unmodified decision of the highest court of that State, is not a property tax of any kind or character. It cannot be fish for the purpose of escaping a State constitutional prohibition rendering it invalid and fowl for the purpose of bringing it within the terms of the taxing grant represented by the compact entered into between the State of Arkansas and the United States.

In the opinion from which this appeal has been taken, the Court says, at the bottom of page 798 (Record 19):

> "It would be an anomalous situation indeed if we should say that an excise tax levied for unemployment against those coming within the law's classifications includes operations within the Reservation, when authority for its enaction came from a State statute as distinguished from congressional authority, but that a tax on incomes *levied uniformly*" (italics ours) "against all citizens, could not extend to the Reservation because the term 'personal property' was used in the Act of 1891."

We think that we have shown above that the right in the first instance, by the decision of this Court, was due to an implied extension in a subsequent Act of Congress, that is, the national Social Security Act, and but for that Act the right did not exist. Congress since that time has expressly extended the right to tax for social security within the area, but it has not surrendered any of its other taxing sovereignty.

Particularly do we wish to call this Court's attention to our contention that the word "equal", that is, uniform, as used in the acts constituting the compact, refers to classification of property and not persons. A privilege tax or occupation tax or license imposed by the State respecting operations on the Hot Springs Reservation would not be effective if the State lacked the sovereignty to exact it, regardless of the fact that it might apply uniformly and equally to all of a class in the State.

The Supreme Court of Arkansas, in the present opinion, reaffirms the classification of the Arkansas income tax as an excise. We quote from page 798 of that opinion (Record 19):

> "* * * Although classified as an excise, our income tax is treated by the courts as having many of the characteristics of a property tax. * * *"

For the sake of argument only let us go further and say that in addition to "*having many of the characteristics of a property tax*" it in fact was some species of a property tax—even that would not bring it within the definition of the tax-reserving clause, for in addition to being a species of a property tax it still would not be a property tax, measured by the qualifying word in the reservation, that is, "personal" property; it still would not be, measured by the qualifying phrase "equal" taxation.

The Arkansas income tax, if considered in the light of "having some of the characteristics of a property tax". nevertheless fails to remotely resemble the kind of tax described in the acts of cession and acceptance. It is not limited to income derived from personal property, nor is there any attempt made to measure it by the use of personal property. It would be impossible to separate that portion of the tax which bore any relationship to the use of personal property, from the portion resulting from earnings occasioned by good management, advertising, personal services, fortunate location, and many other things which go to producing net income.

The Supreme Court of Arkansas summarily disposes of the question by holding that there is authority under the "General Act of 1891 for the State to extend to lessees of personal property on the Reservation the tax assessed against all other citizens within the State" (paragraph 4, page 798, this opinion; Record 19, Par. 1). It ignores completely the words of the Act of 1891, "applicable to the equal taxation of personal property", and substitutes the test of applicability to "all other citizens within the State." This presupposes that the State had the sovereign power to legislate over the area. If the State had sovereignty, that is, if the Act of 1891 extended general

taxation rights as in the case of California over the Yosemite Park area, the Constitution of Arkansas and the United States always would have required the tax levied, as affecting the area, to apply in the same manner "as against all other citizens within the State", but we insist that no such taxing authority was authorized by the compact. The fact of uniformity as to citizens therefore apparently fails to shed little or no light on the meaning of the words of the compact, and the meaning of those words is the subject under consideration.

But regardless of all of this, the Court in the first sentence of this paragraph necessarily placed income tax in the category of a tax "applicable to the equal taxation of personal property" directly contrary to paragraph two on the same page of the opinion, wherein the Court discussed the case of *Stanley* v. *Gates*, and reaffirmed or at least did not change its former opinion holding that the tax in question was an excise and bore no relationship to property or the annual gain or revenue from property. The second sentence of this fourth paragraph changes the property tax back to an excise with some of the characteristics of a property tax, and in the last sentence, there being three in the paragraph, the lack of uniformity and the rate excess is cured by the fact that the tax in question—the income tax—is not the kind of tax required by the laws of Arkansas to be uniform. The tax in our opinion ought to maintain its distinguishing and fundamental characteristics at least throughout one paragraph.

The Constitution of Arkansas, Article 16, Section 8, provides:

> "The General Assembly shall not have power to levy State taxes for any one year to exceed in the

aggregate 1% of the assessed valuation of the property of the State for that year."

The income tax is 2%. The Court has repeatedly held that Section 8, *supra,* applies only to property, that is, the property classified under paragraph 5, sections (a) and (b), of Article 16, of the Constitution of Arkansas. Income tax is not in this classification. The Court in this last sentence says the Arkansas income tax is not invalid for offending this Section 8 because in effect it is not a tax subject to requirements of "equal taxation of personal property." It is now by this sentence something different from what it was in order to come within the terms of the compact in the first sentence. We elect to stand on the statement of the Supreme Court of Arkansas in *Stanley* v. *Gates,* 179 Ark., at page 891, and that is:

> "If it is not a property tax, it does not make any difference what name it is called, whether an excise tax, or a tax in the nature of an excise tax, or a personal tax, is a matter of definition, and does not in any wise change its character."

Property, as that word is understood in its generic sense, may be divided for the purpose of taxation into its component parts, as stated by this Court in the case of *Henneford* v. *Silas Mason Company,* 300 U. S. 577, and *Nashville, Chattanooga & St. L. Ry.* v. *Wallace,* 288 U. S. 249; and if property can be so divided, likewise under the decisions of this Court *supra,* a division of taxing power may be entered into between the State and the United States, each exercising sovereignty over the part retained by it. Arkansas did not take for its share property generally, but property qualified. It took the fagots mentioned by this court in the Henneford case, which were labeled with equal or uniform personal property tags. All the remaining

component parts become the property of the United States for taxation as well as regulation, to the extent which it saw fit to exercise. The opinion of the Supreme Court holding to the contrary appears to be repugnant to the Acts of Congress and the decisions of the courts of the United States on the subject.

We therefore believe from the foregoing that we have established our contention that income tax of Arkansas is not a property tax within the plain meaning of the reservation of the taxing privileges obtained by the State from the terms of the compact represented by the reciprocal Acts of Congress of March 3, 1891, and April 20, 1904, and Act No. 30 of Arkansas of 1903.

III.

The State is precluded from collecting an income tax on the privilege of conducting business in a place beyond its sovereignty.

In the event that we have established our contention that Arkansas has surrendered sovereignty over the area, and lacks the power to impose the particular tax under the terms of any agreement entered into with the United States, then under the authority of *James* v. *Dravo Contracting Company, supra,* it follows that it lacks the power to levy such tax on an Arkansas corporation for the privilege of conducting business within the Hot Springs Reservation.

There was an attempt by the Legislature to impose the tax in a different manner, first, on individuals, second, on corporations, and, third on non-residents; and in the case of corporations—that is, appellant—the levy is "with respect to carrying on or doing business." Evidently this was intended to operate as a privilege or excise tax, and it was within the power of the Legislature to make such a

distinction between corporations and individuals, there being no other prohibition, and if the meaning of the words quoted is to that effect, the levying of the tax clearly is prohibited by this Court's decision in that case.

IV.

Compacts entered into between States and the United States on the surrender of sovereignty over lands lying within the boundaries of the State are to be construed in the same manner as ordinary contracts between individuals, with a strict construction against neither.

We believe that the case of *James* v. *Dravo Contracting Co.*, 302 U. S. 134, is authority in general for this statement and that the case of *Collins* v. *Yosemite Park & Currie Co.*, 304 U. S. 517, specifically on the question of construction supports our contention, for in the latter case this Court says, at page 532:

> "As the respective acts of State and nation were in the nature of mutual declaration of rights, this is not an occasion for strict construction of a grant by a State limiting its taxing power."

And at page 528:

> "Whatever the existing status of jurisdiction at the time of their enactment, the acts of cession and acceptance of 1919 and 1920 are to be taken as declarations of the agreements reached by the respective sovereignties, State and nation, as to the future jurisdiction and the rights of each in the entire area of Yosemite National Park. * * * The States of the Union and the National Government may make mutually satisfactory arrangements as to jurisdiction of territory within their borders and thus in a most effective way, co-operatively adjust problems flowing from our dual system of government. Jurisdiction obtained by consent or cession may be qualified by agreement or through offer and acceptance or ratification. It is a

matter of arrangement. These arrangements the courts will recognize and respect."

If the meaning of the words in the clause of the act reserving the right to tax cannot be determined from its context, or from its connection with other acts on the subject, or from the courts' decisions rendered prior to the passage of the Act, there is still one more source to examine to ascertain the meaning of the clause, and that is the subsequent acts of the parties with reference to the compact entered into. No denial can be made of the fact that the United States has since the acts of cession and acceptance exercised complete sovereignty over the area. The State of Arkansas on its part since that time has confined the exercise of its rights in the area to the taxation on an ad valorem basis of the physical properties of individuals thereon, and in the particular matter the Commissioner of Revenues of the State of Arkansas in 1929 adopted the construction of the clause contended for by the appellant. The State, which can act only through its officers, had acquiesced in that construction for ten years when this demand for the payment of income tax was made. We urge this not as a claim of estoppel against the State, but as an aid to construction of the Act.

We do not think that it is necessary, however, to go beyond the plain wording of the Act to determine its meaning, especially in view of the decision of the Supreme Court of Arkansas in the Gaines case and the subsequent passage of the Act, and we think that the Supreme Court of Arkansas is definitely committed by its statement in the case of *Merchants Transfer & Whse. Co.* v. *Gates*, 180 Ark., at page 102:

"It is a fundamental rule of construction that the Legislature is presumed to have enacted a statute in

the light of all judicial decisions relating to the same subject."

V.

The exemption extended corporations from the payment of income tax on operations conducted beyond the sovereignty of Arkansas and the imposition of a tax in a like situation on appellant's income constitutes a denial to it of the equal protection afforded it under Amendment XIV to the Constitution of the United States, and the sale of its property for such tax would constitute the taking of its property without due process of law, in violation of Amendment V to the Constitution of the United States.

The Supreme Court of Arkansas either ignored this contention made by appellant in that Court or impliedly admitted that if income tax was not embraced in the meaning of the clause reserving taxing power, the principle of law announced applied in this case. In disposing of the question, that Court said, at page 799:

> "We do not agree with appellant that the Reservation, for purposes of taxation, is not within the State."

However, if this Court is convinced from the foregoing argument that Arkansas does not have sovereignty over the area in question and that Act No. 30 of the Legislature of 1903, does not reserve income taxation, then the decision of the Supreme Court of Arkansas in the case of *McCarroll, Commissioner, Et.*, v. *Gregory-Robinson-Speas, Inc.*, 198 Ark. 235, is controlling, and we do not believe that any serious contention will be made to the contrary by appellee. That case was based on the decision of this Court in the case of *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, in which it was held that the portion of the income of a domestic corporation derived from operations conducted beyond the sovereignty of Arkansas

was exempt from income tax, in the construction of Act No. 220 of the Acts of Arkansas for 1931, in relation to Act No. 118 of Arkansas for 1929 (the income tax Acts).

The Legislature is not permitted to exempt corporations doing business entirely without the State from the payment of income tax and yet impose an income tax on that portion of the business done outside the State by one operating both within and without the State of Arkansas, on account of the prohibition contained in Amendment XIV to the Constitution of the United States, the reason being, as given in the opinion, that such a classification would be arbitrary and discriminatory and that the classification could not be based on any substantial ground that did not apply equally to both.

The Legislature of 1931 was attempting to secure the incorporation of foreign interests under the laws of this State, in competition with other States which had particularly liberal laws for domestication of such companies, and as an inducement offered them exemption from the payment of income tax, for the simple reason that the laws of Arkansas, so far as actual operations and business were concerned, had no application to or effect over their conduct in other sovereign areas. Neither would the corporation and its operations beyond the sovereignty of the State have the benefit of the protection of the laws of the State of Arkansas. Any business which any other corporation of any classification does beyond the sovereignty of the State likewise is not subject to the regulation and control of the laws of the State of Arkansas, nor does that business so done have the benefit of the protection of the laws of the State of Arkansas, and to tax one and exempt the other we contend amounts to a discrimination and unequal classification, in violation of the Constitution.

The test of the reasonableness of the classification is not in the wording of it, but the reasoning behind that wording, and the use of the term "doing business wholly outside the State" does not of itself make a substantial classification. This Court said, in the Royster case, at page 415:

> "But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

And:

> "The imposition upon them * * * of taxes, not only upon this income but also upon income that they derived from business conducted outside the State (similar income of the favored corporations being exempted) has the effect of discriminating against them for that *which ought to operate, if at all, in their favor.*" (Italics ours.)

Act No. 220 of Arkansas for 1931 made no attempt to limit its operation to income derived from operations in another sovereignty where the operation was there subject to income, franchise or other tax. The income of a corporation deriving all of its income from Texas operations, which State has no income tax act, is exempt from taxation under the act, and under this decision. The income of an Arkansas corporation derived from operations partly here and partly in Texas is likewise exempt under this decision from taxation on the Texas income. Therefore, following the reasoning and the language of the Royster case, what logical and substantial ground could be suggested or conceived for this exemption of those two classes which "does not apply with equal or greater force as a

ground for exemption from taxation of the income'' of appellant from its National Park operations?

All three operations are without the benefit of the laws of Arkansas and beyond the reach of those laws. They are all subject to national income tax. At the present time, none are subject to income tax at the place of earning the income. There is nothing, however, to prevent the sovereign from taxing that income at the place where it is earned at any time it sees fit. The only difference is that appellant pays to Arkansas a personal property tax on all of its property, including its buildings, and neither of the other pays one cent to Arkansas on its physical properties located in Texas, ''which ought to operate, if at all'', in favor of appellant and not against it.

The most that can be said is that appellant might derive some indirect benefit from Arkansas by reason of the proximity of the Park to the City of Hot Springs, but the same thing would apply to any other border city. The test of the right to tax is sovereignty. We believe that it is a debatable question as to whether the City of Hot Springs, and therefore Arkansas, gets more benefit from the location of the National Park on account of its proximity than the National Park gets from Arkansas, with the argument in favor of the Park.

No one questions the authority of Arkansas to levy an income tax on corporations organized under its laws by reason of operations at any place so long as the same is equal and uniform and applies with like effect to all of the class, and if an unhealthy situation has been created, a repeal of Act No. 220 of Arkansas for 1931 would correct it. However, that is a matter for legislative determination and so long as that Act remains in effect income derived

from business transacted not outside the State of Arkansas, as determined by boundary lines, but outside the sovereignty of the State, where its laws have no force, is not subject to income tax, and its imposition violates the Constitution.

Arkansas probably would be reluctant to abandon the benefits it derives from the enactment of Act No. 220 in 1931, in order to reach revenue from appellant's operations and from the sources precluded by the decision in the case of *McCarroll, Commissioner,* v. *Gregory-Robinson-Speas, Inc., supra,* but that is another question for the General Assembly to decide. It cannot have both, and if by repeal or modification it takes the latter, the parties affected can then adjust themselves to meet the situation. The same result accomplished by judicial determination operates *ex post factor.*

CONCLUSION

We think that the authorities cited sustain us in our contention that this Park area has ceased to be a part of Arkansas and has passed over to the United States just as effectively as if it had been exempted on admission; that regardless of the fact that it is completely surrounded by the State, the character of he sovereignty over it is no different from the indentation of Missouri in the northeast corner and Texas in the southwest.

We have not been able to find one Arkansas case that does not hold that equal and uniform taxation and the 1% rate limit applies only to that species of property assessed on an ad valorem basis. Certainly the cases bear us out in the argument that income tax is not in this classification, and if not, likewise it is not a tax within the meaning of the words embraced in the compact, and those words of

necessity must be given some meaning, since they are not presumed to have been used purposely.

In fact, the income tax in the particular case is not levied equally and uniformly on appellant as on Arkansas businesses in its ultimate effect, for the Arkansas merchant or operator can pass his tax on to the consumers at the time of fixing the price for merchandise or service. Appellant operates only under the rules and regulations of the United States, the Department of the Interior and its division on Natural Parks; its business is subject to the control of the Park Commissioner; the price which it charges for its services is fixed by the regulations pertaining to the Park; it is limited as to the time and amount of dividends which it may pay, by the regulations under which it operates, and it is regulated in many other respects not applicable to the business of the Arkansas merchant or operator. It is, in short, amenable to another sovereign, and no Act of Arkansas whatever can have any effect on forcing the United States to adjust these regulations under which appellant operates and the price of its services to meet the tax.

The compact may have failed to operate to the satisfaction of one or both of the parties, and if so it is a subject that could be adjusted by Congress and the Legislature of Arkansas, as was said in the Lowe case:

> "* * * and if to their more effective use a cession of Legislative authority and political jurisdiction by the State would be desirable, we do not perceive any objection to its grant by the legislature of the State."

This applies equally to both parties, and if Arkansas in fact needs more sovereignty over this area, it is, likewise, in the power of Congress, on proper showing, to grant it, but until that is done the compact remains a matter

of arrangement between the parties. "These arrangements the Courts will recognize and respect." (*Collins* v. *Yosemite Park & Currie Co., supra.*)

We earnestly contend that the State of Arkansas failed to save enough taxing power on the surrender of sovereignty in this area to permit the exaction of income tax which the Supreme Court of Arkansas in its last announcement, that is, this very decision, classifies as an excise tax, and that it was not in fact the intention of Congress or the Legislature of Arkansas to contract or enter a compact with reference to a tax of this classification, especially since no such existed at that time.

We urge that if this area is beyond Arkansas' sovereignty, the imposition of a tax on appellant or its operations and the exemption of others under similar circumstances denies to appellant the equal protection afforded it under the Constitution, and the sale of its property for the tax would be without due process of law.

We respectfully contend that the decision in the present case should be reversed.

TERRELL MARSHALL,
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APPENDIX

Act No. 30 of the General Assembly of the State of Arkansas, approved February 21, 1903:

"SECTION 1. That exclusive jurisdiction over that part of the Hot Springs Reservation known and described as part of the Hot Springs mountain and whose limits are particularly described by the following boundary lines * * * all in Township 2 South, Range 19 West, in the County of Garland, State of Arkansas, being part of the permanent United States Hot Springs Reservation, is hereby ceded and granted to the United States of America, to be exercised so long as the same shall remain the property of the United States; provided, that this grant of jurisdiction shall not prevent the execution of any process of the State, civil or criminal, on any person who may be on such reservation or premises; provided, further, that the right to tax all structures and other property in private ownership on the Hot Springs Reservation accorded the State by the Act of Congress approved March 3, 1901" (1891) "is hereby reserved to the State of Arkansas."

Constitution of Arkansas (1874), Art. XVI:

"SEC. 5. All property subject to taxation shall be taxed according to its value (a), that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State (b). No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value (c), provided the General Assembly shall have power from time to time to tax hawkers, peddlers (d), ferries, exhibitions and privileges (e), in such manner as may be deemed proper."

"SEC. 8. The General Assembly shall not have power to levy State taxes for any one year to exceed

in the aggregate one per cent of the assessed valuation of the property of the State for that year."

Act of Congress, April 20, 1832, 4 Stat. at L. 505, par. 3:

"The hot springs in said territory, together with four sections of land, including said springs, as near the center thereof as may be, shall be reserved to the future disposal of the United States and shall not be entered, located or appropriated for any purpose whatever."

Act of Congress, December 16, 1878, c. 5, 20 Stat. 258:

"Provided, that all titles given or to be given by the United States shall explicitly exclude the right to the purchaser of the land, his heirs or assigns, from forever boring thereon for hot water; and the hot springs, with the reservation and mountain, are hereby dedicated to the United States and shall remain forever free from sale or alienation."

Act of Congress, March 3, 1891, c. 533, par. 5, 26 Stat. 844:

"The consent of the United States is hereby given for the taxation under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State, as personal property, of all structures and other property in private ownership on the Hot Springs Reservation."

Act of Congress, April 20, 1904, c. 1400, par. 1, 33 Stat. 187:

"The portion of the Hot Springs mountain reservation in the State of Arkansas situated and lying within boundaries defined as follows * * * all in Township 2 South, Range 19 West, in the County of Garland and State of Arkansas, being a part of the permanent United States Hot Springs Reservation, sole and exclusive jurisdiction over which was ceded to the United States by an act of the General Assembly of the State

of Arkansas * * *, which cession is hereby accepted * * * shall be under the sole and exclusive jurisdiction of the United States * * *. Provided that nothing in this act shall be so construed as to forbid the service within said boundary of any civil or criminal process of any court having jurisdiction in the State of Arkansas * * * And provided, further, that this act shall not be so construed as to interfere with the right to tax all structures and other property in private ownership within the boundaries above described accorded to the State of Arkansas by section 5 of the Act of Congress approved March 3, 1891, entitled 'An Act to Regulate the Granting of Leases at Hot Springs, Arkansas, and for Other Purposes'."

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